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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 794

CHARLES GIVENS,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

MICHAEL WASHOR
16 Court Street
Brooklyn, N. Y. 11201
Attorney for Petitioner

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner, CHARLES GIVENS, prays that a Writ of Certiorari issue to review the final order of the Court of Appeals of the State of New York, made in this action, September 26, 1968, affirming the order of the Supreme Court of the State of New York, Appellate Division, held in and for the Second Department, entered June 6, 1966, affirming the judgment of the conviction of the Petitioner for violating Section 340 of the Banking Law of the State of New York, rendered in the Supreme Court of the State of New York, held in and for the County of Kings, June 17, 1964.

The sentence imposed on the Petitioner as a consequence of said conviction was an indeterminate prison term not exceeding three years under Article 7A of the Correction Law of the State of New York as it was then in effect. Article 7A of the Correction Law of the State of New York was repealed under and by virtue of the laws of the State of New York, Chapter 324, Section 6, effective September 1, 1967. While Article 7A of the said Correction Law of the State of New York is no longer in effect, the Petitioner has yet to serve this sentence. The sentence imposed upon this Petitioner was interrupted by an order of the Honorable Stanley H. Fuld, staying the execution thereof, pending the appeal to the Court of Appeals of the State of New York, and allowing the said appellant to be at liberty on bail pending the determination of that appeal.

OPINION BELOW

This case was tried in the Supreme Court of the State of New York, held in and for the County of Kings, before the Honorable John R. Starkey. Prior to trial this Petitioner moved to controvert a search warrant and otherwise suppress the evidence. That motion was held before the Honorable Hyman Barshay, a Judge of the said Supreme Court of the State of New York, held in and for the County of Kings. After a hearing where testimony was taken, the motion was denied by the order of the Honorable Hyman Barshay and the case proceeded to trial. (R. 119)[1]

During the trial the Petitioner pled guilty to the sixth count of the said indictment (R. 85).

Even though the appellant pled guilty during trial, he was, under State Law, entitled to appeal and so bring up the issue raised by the motion to controvert the search warrant and to suppress the evidence. See Section 813-c, Code of Criminal Procedure of the State of New York and *Sibron*

[1] This refers to the pagination of the Record on Appeal in the Court of Appeals in the State of New York.

v. The State of New York, Supreme Court of the United States, October 1967 Term, No. 63, decided June 10, 1968, ___ U.S. ___.

Upon the said conviction of the Petitioner, on the sixth count of the indictment, an appeal was taken by the Petitioner to the Supreme Court of the State of New York, Appellate Division, held in and for the Second Department, which affirmed the said conviction. The opinion of that Court was officially reported in 26 A.D.2d 684, 272 N.Y.S.2d 466, and is printed as appendix B hereto. Thereafter, the Petitioner appealed to the Court of Appeals of the State of New York which affirmed the order of the said Appellate Division of the State of New York held in and for the Second Department. The decision or opinion of the said Court of Appeals of the State of New York is printed as Appendix A hereto and is officially reported in 21 N.Y.2d 929, 289 N.Y.S.2d 761.

JURISDICTION

The order of the Court of Appeals of the State of New York was entered April 4, 1968. An order of the Court of Appeals of the State of New York respecting a rehearing or reargument was entered on September 26, 1968.

No order extending the time to file this petition has been entered, no application for such relief having been made to this Court.

The motion for reargument was denied. The motion to amend the remittitur was granted indicating that the Court of Appeals passed upon questions under the Constitution of the United States, viz.: denial of equal protection of the laws and the 4th, 5th and 14th Amendments to the United States Constitution.

The jurisdiction of this Court is invoked under 28 U.S.C. 1257, Section 3.

QUESTIONS PRESENTED

1. In Section 792, sub-division 4, of the Code of Criminal Procedure of the State of New York, allowing the police to search for and seize mere evidence of a crime violative of the Fourth, Fifth and Fourteenth Amendments to the United States Constitution, as applied to the facts of this case, where the search warrant did not specifically describe the evidence and there was no probable cause that such evidence existed at the premises to be searched, or on the persons to be searched.

2. Where the police have a search warrant and do not, prior to the execution thereof, announce their purpose and authority but gain entrance to a domicile by first sending in a person to speak to the suspect, and when such person leaves, make entry and after such entry announce their purpose and authority, violative of the Fourth Amendment to the Federal Constitution.

STATUTES INVOLVED

Section 792 of the Code of Criminal Procedure of the State of New York, provides in pertinent part as follows:

> "The following property may be ordered seized under a search warrant: 1. . . . 2. . . . 3. . . . 4. Property constituting evidence of a crime or tending to show that a particular person committed a crime. . . .
>
> Added laws 1962 Chapter 542 Section 2, effective July 1, 1962."

Section 799 of the Code of Criminal Procedure of the State of New York, in pertinent part as follows and which was in effect at the time the said search warrant was issued herein, provided as follows:

> "OFFICER MAY BREAK OPEN DOOR OR WINDOW TO EXECUTE WARRANT.
>
> The officer may break open an outer or inner door or window of a building or any part of the

> building, or anything therein, to execute the warrant, if, after notice of its authority and purpose he be refused admittance".

Irrelevant to the consideration hereof, for the Court's convenience, it is noted that Section 799 of the Code of Criminal Procedure of the State of New York was amended by the laws of 1964, Chapter 85, effective July 1, 1964. That Section provides as follows:

> "799 Officer may break open door or window to execute warrant.
>
> The officer may break open an outer or inner door or window of a building or any part of the building, or anything therein to execute the warrant, (a) if, after notice of his authority and purpose, he be refused admittance, or, (b) without notice of his authority and purpose, if the Judge, Justice or Magistrate issuing the warrant has inserted a direction therein that the officer executing it shall not be required to give such notice. The Judge, Justice or Magistrate may so direct only upon proof under oath, to his satisfaction, that the property sought may be easily and quickly destroyed or disposed of, or that danger to the life or limb of the officer or another may result, if such notice were given."

The said search warrant herein was dated October 24, 1963 (R. 107, 108); the said search warrant was executed and an inventory taken of the fruits of the seizure October 30, 1963 (R. 113, 114, Petitioner's Exhibit C). Section 180 of the Code of Criminal Procedure of the State of New York provides as follows:

> "must state his authority, and cause of arrest, except where party is committing felony or is pursued after escape.'
>
> When arresting a person without a warrant the officer must inform him of the authority of the officer and the cause of the arrest except when the person arrested is in the actual commission of a crime, or is pursued immediately after an escape."

The Fourth Amendment to the Federal Constitution of the United States provides as follows:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the United States Constitution in its pertinent part provides as follows:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State where they reside . . .; nor shall any state deprive any person of life, liberty, or property without due process of law; . . ."

Section 793 of the Code of Criminal Procedure of the State of New York provides as follows:

> "It cannot be issued but upon probable cause, supported by affidavit.
>
> A search warrant cannot be issued, but upon probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched."

Section 340 of the Banking Law of the State of New York, 4 McKinney's Consolidated Laws of New York, Annotated, Section 340, provides as follows:

> "Doing business without license prohibited.
>
> No person, partnership, association or corporation shall engage in the business of making loans of money, credit, goods or things in action in the amount or of the value of $800.00 or less, contract for, or receive a greater rate of interest, discount, or consideration therefor than the lender would be permitted by law to charge if he were not a licensee hereunder except as authorized by this article and without first obtaining a license from the Superin-

tendent of Banks. As amended L. 1960 C.690, Section 1, effective July 1, 1960."

The Fifth Amendment to the Federal Constitution provides in pertinent part as follows:

". . . nor shall be compelled in any criminal case to be a witness against himself, . . ."

Rule 40 of the Rules of the Supreme Court of the United States, sub-division D (2) in pertinent part provides as follows:

". . . questions not presented according to this paragraph will be disregarded, save as the Court, at its option, may notice a plain error not presented".

Section 527 of the Code of Criminal Procedure of the State of New York, states in its relevant part as follows:

". . . And the Appellate Court may order a new trial if it be satisfied that the verdict against the prisoner was against the weight of the evidence or against the law, or that justice requires a new trial, whether any exception shall have been taken or not, in the Court below. . . ."

Section 813-c of the Code of Criminal Procedure of the State of New York states in its relevant part as follows:

"The motion in general.

A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as property, claimed to have been unlawfully obtained, may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The Court shall hear evidence upon any issue of fact necessary to determine the motion."

"If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. . . ."

STATEMENT OF THE CASE

(a)

The appellant was indicted by a Grand Jury of Kings County of the State of New York. The indictment contained twenty counts (R. 6-8). Prior to the rendering of the indictment, the police procured a search warrant from the Criminal Court of the City of New York, County of Kings (R. 107, 108). The search warrant was granted after a police officer submitted his affidavit praying for the granting of the search warrant (R. 109). The search warrant is printed in Appendix C of this petition; the affidavit is printed herein as Appendix D.

Prior to trial, the petitioner by motion supported by his affidavit, moved to controvert the search warrant and suppress the evidence (R. 104-106). The petitioner based his claim on the fact that the search warrant authorized a seizure of "mere evidence". The motion came on to be heard before trial, in the Supreme Court of the State of New York, held in and for the County of Kings. The Hon. Hyman Barshay, a Judge thereof, heard the motion (R. 24). To determine the issues raised therein the Court directed a hearing.

Michael Lizzio, a New York City police officer and the person who procured the search warrant, testified.

He testified that on October 28, 1963 having procured the search warrant, he set about to execute the search warrant. He was accompanied by another police officer.

On October 28, 1963, Lizzio went to the premises known as 142 Madison Street, Brooklyn, New York, which contained the particular apartment occupied by the petitioner (R. 30). Lizzio was also accompanied by a person by the name of Hooks, who was named as the complainant in the sixth count of the indictment herein. (R. 30)

Having arrived at the dwelling, the police did not enter. Instead, they sent in Hooks, a private party (R. 30). Hooks entered the apartment. The police heard nothing after the entry (R. 30-31). Lizzio and the other police officer stood at each side of the entrance of the apartment (R. 31). While lingering outside, the police did not announce their purpose and authority. (R. 31)

Later, Hooks opened the door of the apartment as he was about to leave. As Hooks opened the door and while the door was open, the police entered the apartment. Having gained entry and while they were in the apartment they first announced themselves (R. 31, 32). Once inside, the police closed the door of the apartment (R. 32). Present was the petitioner. The police then decided to search the apartment (R. 33).

Lizzio did not remember how long he was in the apartment.

While Lizzio was just searching, a certain record book (Item 3 listed on the return of the search warrant) could not be found. Apparently this was the object of the search. To procure the book, the police told the appellant what they were looking for. Then the appellant gave them the book (R. 34). However, prior to this surrender, the police were there 20 or 30 minutes searching (R. 34). The search was described by Lizzio as a "rhythmic search of the apartment" coupled with the questioning of the petitioner (R. 34). The police told the petitioner that if he didn't give them the "book, we would have to search hard" (R. 35).

Lizzio was further questioned as to certain information in the nature of hearsay which he got from Hooks. This was alleged in the affidavit submitted to procure the search warrant.

The police officer thus testifying stated that Hooks gave them certain information September 30, 1963 (R. 35). After that, the police heard a conversation between Hooks and the appellant while the police were concealed in Hooks' apartment (R. 35-36).

Hooks told the police about the book (R. 36). However, the police could not recall whether Hooks described the book (R. 36). At no time prior to the seizure did the police ever see any book or records (R. 36). Further, the police couldn't recall if Hooks ever described the color of the book (R. 37).

The hearsay relayed by Hooks to the police consisted of a statement that the book had a record of payments by individuals who borrowed money from the petitioner (R. 38). Hooks further related to the police that he saw the book produced by the petitioner at the time he made a payment to the petitioner (R. 38). Hooks further stated that the book was in the bedroom of the apartment (R. 38-39).

Hooks however, never stated that he saw any transactions in the book (R. 39). The police waited from October 1, 1963 to October 24, 1963 to procure the search warrant (R. 41). The warrant was finally issued October 24, 1963 (R. 41). Four days later, October 28, 1963, the warrant was executed (R. 41).

Lizzio admitted that he never made any observation of the petitioner's home (R. 41). Nor did this police officer ever overhear any conversations between Hooks and the petitioner between October 1, 1963 and October 24, 1963 (R. 41-42).

On September 30, 1963, the police officer heard a conversation between a person named Eunice Johnson who was ultimately a co-defendant with the petitioner and Hooks (R. 42). This was a telephone conversation that emanated from the District Attorney's office to Johnson who was at the appellant's apartment (R. 42-43). The police overheard the conversation by listening in to the telephone receiver while Hooks spoke (R. 43).

(b)

After the motion was denied, the case proceeded to trial before the Hon. John R. Starkey, a Judge of the said Supreme Court of the State of New York, held in and for the County of Kings. The trial was interrupted by the taking of the plea to the sixth count of the indictment by the petitioner. However, at the time the petitioner took the plea, the Court acknowledged that the testimony of Hooks given at trial differed from the indictment (R. 89).

(c)

The issue as to the validity of the search warrant allowing the search of mere evidence, was raised by a notice of motion supported by an affidavit. This was the practice afforded a person aggrieved by an unlawful search and seizure under Section 813-c of the Code of Civil Procedure of the State of New York. The issue thus tendered, was heard in an adversary hearing in the trial court (R. 24). During the hearing, the facts were disclosed as to the method of entry and the extent of the search as well as the manner of the search (R. 40).

Upon appeal to the intermediate Appellate Court namely, the Appellate Division of the Supreme Court of the State of New York, Second Department, the petitioner not only raised the validity of the search warrant but the method of its execution.

Under state law the Appellate Division had a right to consider the additional issue as to the execution of the search warrant. See Section 527 of the Code of Criminal Procedure of the State of New York and *People v. Kelly & Koenig*, 12 N.Y.2d 248; 250, 238 N.Y.S.2d 934, 935.

Furthermore, the court can consider such additional issue as to the execution of the search warrant because these facts were brought out during the hearing; they are clearly a part of the record. The manner in which the police executed the search warrant and the failure to give notice of

purpose and authority prior to the entry into the apartment, constituted a constitutional defect that is "plain error"; see Rules of the Supreme Court of the United States, Rule 40 (d) (2); see also *Silber v. United States,* 370 U.S. 717, 8 L. Ed. 2d 798, 82 S. Ct. 1287.

REASONS FOR GRANTING THE WRIT

Section 792 (4) of the Code of Criminal Procedure of the State of New York it is submitted is unconstitutional as applied to the facts in this case. While the intermediate Appellate Court in New York, namely the Appellate Division, held that such statute was constitutional, it also held that the search warrant in this case was void for vagueness. Intervening between the time of that decision and the ultimate disposition in the Court c Appeals of the State of New York, this Court decided *Maryland Penitentiary v. Hayden,* 387 U.S. 294, 18 L. Ed. 2d 782, 87 S. Ct. 1642. This Court there upheld the search and seizure of items of clothing attributed to the possession of the accused. The accused was charged with a robbery. The seizure of the clothing that the petitioner was observed wearing during the occurrence was made in "hot pursuit" of the accused. The clothing was held not to have been communicative but to have been evidence of identity. The reasoning of that opinion was to the effect that the rule prohibiting a search for mere evidence had no vitality. It was pointed out that the former restraint as to a seizure of mere evidence was based on a superior property right to the evidence on the part of the individual and that the government had a subsidiary or tenuous interest in such items. This Court discarded that reasoning because past decisions of this Court disregarded the rules relating to property interests where the Fourth Amendment was involved.

However, *Hayden* dealt with clothing. The reasoning of the opinion limited the holding of *Hayden* to evidence which is clothing and not communicative.

It is submitted that *Hayden* left open the question where books and papers are seized. In this case books and papers were seized as mere evidence. The books and records incriminated this petitioner. Further, the police did not just find these items in the premises occupied by the Petitioner. They asked the Petitioner to surrender the same. This was violative of the privilege against self-incrimination. It is further put to this Court, that the search warrant in this case allowing the search for books and records or mere evidence, not only involved the Fourth Amendment to the Federal Constitution, but the Fifth Amendment guaranty of the privilege against self-incrimination. See *Boyd v. United States,* 116 U.S. 616, 29 L. Ed. 746, 6 S. Ct. 524. However, it is further put to this Court that *Hayden* is distinguishable therefor from the facts presented in this application. In *Hayden* there was a brutal crime involving violence. Here a mere misdemeanor was involved. In *McDonald v. United States,* 335 U.S. 451, 93 L. Ed. 153, 69 S. Ct. 191, this Court held that the type of crime involved and the intensity of it, were relevant in determining whether a search and seizure were reasonable.

In *Hayden* the police were in "hot pursuit". Here, the police were casual in proceeding and waited about three weeks to procure the search warrant.

The seizure of clothing in *Hayden* was salutary. The identity of the felon was a vital issue because of the type of crime. It was important to properly obtain a true identity of the suspect so that an innocent person might not be charged. It was further indicated in *Hayden,* that while a search for mere evidence is allowable, nevertheless such search must be limited and that the search warrant if one be granted, be specific as to what may be seized thereunder. *Hayden* clearly recognized that a search for evidence may disintegrate into a "general search".

Hayden recognized that a search pursuant to a warrant authorizing a search for "mere evidence" must fulfil the probable cause and particularity requirement of the Fourth

Amendment to the Federal Constitution and that these standards must be determined and met by a Judge.

The prohibition against a general search warrant is of constitutional dimensions. The Fourth Amendment expressly prohibits such a warrant. The State of New York enacted Section 793 of the Code of Criminal Procedure which mandates that property to be seized be specifically described in the warrant.

The case for the generality of a search warrant was considered in *Berger v. New York*, 388 U.S. 41, 18 L. Ed. 2d 1040, 87 S. Ct. 1873. There it was held, that in executing the search warrant, nothing must be left to the discretion of the officer executing it, as to what to seize or not to seize. In this application, the inventory of what was seized consists of nine items including an address book and a black record book (R. 113-114). The search warrant itself described what could be seized in the following generality:

> "Books, records and other paraphernalia used for the purpose of operating a loan shark and money lending business, all in violation of Sections 340 and 357 of the Banking Law of the State of New York. . . ." (R. 107-108)

The record here clearly discloses that no one ever saw any books and records, except Hooks the complainant. He was now shown to be a reliable informant. Consequently there is only the untested word of this informant or complainant. The police made no observations of any tangible property subject to seizure in the possession of this petitioner.

The reason that the search warrant therefore was general, was that nobody could describe what could be seized.

Firstly, there was no probable cause that the book and record existed and were at the premises to be searched or were in the possession of the petitioner. This, it is submitted, is the reason the search warrant was not specific. Hooks the complainant adequately failed to describe the

property to be seized. Tangible property was never seen by the police officer (R. 36). The color of the books, the shape of the papers, the type of the papers, the type of the books were not stated by Hooks (R. 37). At first, Hooks allegedly related that the appellant referred to a book (R. 38). The complainant told the police officer he never saw any of the transactions in the books or records (R. 39).

In *Miller v. Russell*, 321 F.2d 853, C.C.A. Pa., it was held that before a person's privacy can be invaded by the police acting under a search warrant, there must be probable cause that the search would be fruitful; in this connection see also *United States v. Simms*, 201 F.S. 405, 409; *United States v. Price*, 149 F.S. 707.

Dyke v. Taylor Implement Mfg. Co. Inc., October 1967 Term, No. 149 decided May 20, 1968. This case held in part, that even in the case of a transitory vehicle, there is a failure of probable cause to search where there are no facts supporting the authorities' belief that tangible evidence exists. If such is the ruling as to an automobile, then such ruling applies with greater force to a house or dwelling.

Another element of the unreasonableness of the search and seizure herein relates to the manner in which the police executed the search warrant.

New York State provided in Sections 797 and 178 of the Code of Criminal Procedure, that in executing a search warrant or in making an arrest, the police, prior to their entering the premises must give notice of their purpose and authority. The facts here clearly disclose that the search warrant was not executed pursuant to those statutes. It is submitted, that these rules are of constitutional dimensions.

Firstly, this court will recall that the police having the search warrant, went with the complainant to the subject apartment (R. 30-31). Hooks, the complainant, was sent in first. When Hooks emerged from the apartment the police then entered. After they made their entry the police first announced their purpose and authority. It has never been held that unannounced entries into a private dwelling are

proper under all circumstances; see *Ker v. California*, 374 U.S. 23, 10 L. Ed. 2d 726, 83 S. Ct. 1623. That case held that only exigent circumstances would relieve the police of this obligation in entering into premises either to execute a search warrant or to make an arrest.

This Court on June 3, 1968, in *Sabbath v. United States*, October Term 1967, No. 898, held that an unannounced entry into premises even where the door was unlocked and the police did not break it open, involved an illegal entry. The Court did not directly deal with the issue where the police used the rules citing *Smith v. United States*, 357 F.2d 486, and *Leahy v. United States*, 272 F.2d 487. However, it is submitted that the intendment of that opinion would preclude the police from using trickery to gain entry. Firstly, the purpose of announcing authority not only helps the police, but is directed toward the privacy of the person. *Sabbath* recognized that the requirement of announcement deals with "fundamental values". Since, the petitioner was entitled to know why the police were entering the apartment, it is submitted that the ruse practiced by the police in this case could not deprive the petitioner of this fundamental right; when the Petitioner opened the door for Hooks or when Hooks opened the door to leave, this did not work a relinquishment of the petitioner's fundamental right. In *Miranda v. Arizona*, 384 U.S. 436, 16 L. Ed. 2d 694, 86 S. Ct. 1602, it was held that no one is deemed to waive a fundamental right unless the waiver is made voluntarily, knowingly and intelligently. See also *Berger v. New York*, 388 U.S. 41, 18 L. Ed. 2d 1049, 87 S.C.P. 1873.

In the event that the application is denied, it is respectfully requested that such denial be without prejudice to the Petitioner applying to the appropriate United States District Court for a Writ of Habeas Corpus to secure the federal rights of Petitioner pursuant to *Fay v. Noia*, 372 U.S. 391.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL WASHOR
Attorney for Petitioner

APPENDIX A

OPINION OF THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, HELD IN AND FOR THE SECOND DEPARTMENT

(272 N.Y.S.2d 466)

Before Ughetta, Acting P.J., and Christ, Hill, Rabin and Benjamin, JJ.

MEMORANDUM BY THE COURT.

Appeal by defendant from a judgment of the Supreme Court, Kings County, rendered June 17, 1964, convicting him of violation of section 340 of the Banking Law, a misdemeanor (engaging in the business of making loans of $800 or less without a license), upon a plea of guilty, and imposing sentence. Defendant's appeal brings up for review (Code Crim. Pro. Sec. 813-c) an intermediate order of said court, entered May 4, 1964, which after a hearing, denied his motion to controvert a search warrant and to suppress the evidence seized upon the execution of such warrant.

Order and judgment affirmed.

In our opinion, the motion to suppress was properly denied. Although we agree with the defendant's contention that the search warrant lacked specificity and may have fallen within the rule proscribing general searches as unwarranted fishing expeditions (cf. Stanford v. State of Texas, 379 U.S. 476, 486, 85 S. Ct. 506, 13 L.Ed. 2d 431; Marron v. United States, 275 U.S. 192, 196, 48 S. Ct. 74, 72 L. Ed. 231; People v. Carroll, 38 Misc. 2d 630, 634, 238 N.Y.S.2d 640, 644), nevertheless, this irregularity does not affect the validity of the defendant's judgment of conviction, entered upon his plea of guilty, since it is incontrovertible that the People did obtain the challenged book of account as incidental to defendant's lawful arrest on sufficient cause.

While therefore, as indicated, the search warrant may have been assailable because it was a general warrant, the People's

possession of the book seized as an incident to lawful arrest was not dependent on the validity of the search warrant, and the book was independently receivable in evidence as an incident to the arrest, if the People elected to offer it as an exhibit (People v. Matherson, 16 N.Y.2d 509, 260 N.Y.S.2d 448, 208 N.E.2d 180; People v. Peskin, 16 N.Y.2d 511, 260 N.Y.S.2d 449, 208 N.E.2d 180). The practicability of obtaining a search warrant is not controlling when a seizure is justified as an incident to the arrest (Ker v. State of California, 374 U.S. 23, 31, 83 S. Ct. 1623, 10 L.Ed. 2d 726). The fact that the book was defendant's property and was evidentiary in character did not preclude its seizure as something that was unreasonable or violative of due process under the Fourth and Fifth Amendments (People v. Carroll, supra; State v. Bisaccia, 45 N.J. 504, 213 A.2d 185).

APPENDIX B

OPINION AND DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

April 4, 1968

Appeal from Supreme Court, Appellate Division, Second Department, 26 A.D.2d 684, 272 N.Y.S.2d 466. Searches and Seizures 3.3(1)

Provision of Code of Criminal Procedure that property constituting evidence of crime or tending to show that a particular person committed a crime is constitutionally valid. Code of Criminal Procedure, Sec. 792 Subd. 4.

Defendant was charged by indictment having 20 counts with violating Section 340 of the Banking Law, Consol. Laws, c.2, for engaging in the business of making loans of $800 or less without a license.

The defendant made a motion to suppress certain evidence, including a book, which contained records of allegedly usurious transactions, and which was seized during a search of apartment of defendant under a search warrant authorizing a search for records used for purpose of operating a "Loan shark and money lending business."

The motion was denied under the Code of Criminal Procedure, Section 792, subd. 4 providing that property constituting evidence of crime or tending to show that a particular person committed a crime may be ordered seized under a search warrant.

The defendant pleaded guilty to the sixth count of the indictment charging that defendant loaned to named person the sum of $150 on express agreement that named person was to repay sum of $240 at rate of $30 per week for eight weeks, thereby engaging in the business of making loans of $800 or less without obtaining a license from the Superintendent of Banks in violation of the Banking Law, Section 340.

September 26, 1968

2 Mo. No. 691
The People &c.,

Respondent,

vs.

Charles Givens,

Appellant.

Motion for reargument denied. Motion to amend the remittitur granted, return of remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz: Defendant argued that subdivision 4 of section 792 of the Code of Criminal Procedure of the State of New York denies him the equal protection of the laws under the Fourth, Fifth and Fifteenth Amendments. The Court of Appeals held that there was no violation of defendant's constitutional rights under any of these Amendments.

DECISION COURT OF APPEALS SEP 26 1968

APPENDIX C

SEARCH WARRANT

IN THE NAME OF THE PEOPLE OF THE STATE OF NEW YORK:
To Any Peace Officer in the State of New York:

Proof by affidavit having been made this day before me by MICHAEL J. LIZZIO, a Detective in the New York City Police Department, Shield # 2841, assigned to the Rackets Bureau of the District Attorney's Office, Kings County, that there is in the possession, custody or control of certain individuals, to wit: CHARLES GIVENS and EUNICE JOHNSON, also known as EUNICE GIVENS, in the ground floor left apartment at premises 142 Madison Street, Borough of Brooklyn, County of Kings, City and State of New York, books, records and other paraphernalia used for the purpose of operating a loan shark and money lending business, in violation of Section 340 and 357 of the Banking Law of the State of New York, and that the said property is in the possession of the said CHARLES GIVENS and EUNICE JOHNSON, also known as EUNICE GIVENS, with intent to use it as a means of committing a public offense in that it is so maintained for said purposes in said ground floor left apartment at premises 142 Madison Street, Brooklyn, New York.

YOU ARE THEREFORE COMMANDED, in the daytime, to make immediate search of premises 142 Madison Street, ground floor left apartment, Borough of Brooklyn, County of Kings, City and State of New York, and of the persons of the said CHARLES GIVENS and EUNICE JOHNSON, also known as EUNICE GIVENS, for the following property:

Books, records and other paraphernalia used for the purpose of operating a loan shark and money lending business, all in violation of Sections 340 and 357 of the Banking Law of the State of New York, and if you find the same, to bring it forthwith before me in the Criminal Court of the

City of New York, 120 Schermerhorn Street, County of Kings.

STRONG
Judge of the Criminal Court

Dated: Brooklyn, New York
October 24, 1963

APPENDIX D

AFFIDAVIT OF MICHAEL J. LIZZIO

CRIMINAL COURT
Kings County

In the Matter of

The Application of MICHAEL J. LIZZIO, a Detective, Shield # 2841, in the New York City Police Department, assigned to the Office of the District Attorney, Rackets Bureau, Kings County, for a warrant authorizing the search of premises 142 Madison Street, ground floor left apartment, in the Borough of Brooklyn, County of Kings, City and State of New York, and the persons of Charles Givens and Eunice Johnson, also known as Eunice Givens, for certain property constituting evidence of a crime and tending to show that particular persons have committed a crime.

STATE OF NEW YORK)
: SS.:
COUNTY OF KINGS)

MICHAEL J. LIZZIO, being duly sworn, deposes and says:

I am a Detective in the New York City Police Department, Shield # 2841, assigned to the Rackets Bureau of the District Attorney's Office, Kings County.

A complaint was received in the Office of the District Attorney, the identity of the complainant will be revealed to the Court if requested, to the effect that one Charles Givens and Eunice Johnson, also known as Eunice Givens, are operating a loan shark and money lending business in violation of Sections 340 and 357 of the Banking Law of the State of New York, to wit: lending money at illegal rates of interest and lending money by unauthorized persons.

According to the complainant in or about the month of June, 1963, complainant did make arrangements to borrow

the sum of $150.00 and did, in fact, borrow the said sum of $150.00 from the aforementioned Charles Givens.

At the time of the loan, an agreement was entered into between complainant and Charles Givens, wherein the complainant was to pay $30.00 per week as interest on this loan; the $150.00 principal of the loan to remain as an obligation. The $150.00 principal of the loan was to be returned in one lump sum, at which time interest in the sum of $30.00 for the week in which the total loan was repaid was to be added to the $150.00.

According to the complainant, he paid in excess of $240.00 as interest without any reduction in the amount of the principal debt.

Complainant informed your deponent that the said Charles Givens could be reached at Sterling 3-7023. Investigation made by your deponent indicated that telephone number Sterling 3-7023 is listed in the records of the New York Telephone Company at premises 142 Madison Street, Brooklyn, New York, in the name of Charles Givens.

Your deponent dialed the aforementioned telephone and listened in while complainant and Eunice Johnson, also known as Eunice Givens, discussed the loan and the interest rates. In this conversation, overheard by your deponent, Eunice Givens represented herself to be the wife of Charles Givens. Eunice Givens left the telephone, returned briefly thereafter, and informed the complainant that he should be paiding $37.50 per week interest and was getting a break in being charged only $30.00 per week. She further said that her husband sometimes gave friends a break on the interest rate.

During this telephone conversation Charles Givens returned to the apartment and engaged in a conversation on the telephone with the complainant. He made it clear that the $30.00 per week being paid by the complainant was merely for interest and that the principal of the loan in the sum of $150.00 remained outstanding.

Complainant made an appointment with Charles Givens to see him in complainant's apartment, and this appointment was kept by Charles Givens on October 1, 1963, in the afternoon. Your deponent and a brother officer was secreted in the apartment at the time and overheard the conversation between complainant and Charles Givens. Charles Givens again informed the complainant that he would be compelled to continue the payment of $30.00 per week interest and this would, in no way, reduce the principal debt of $150.00.

When complainant requested an accurate accounting of the interest already paid and the arrears, if any, in interest, Charles Givens informed him that he would have to look at the records which were at his home. The complainant informs me that on several occasions he did call at the home of Charles Givens and did see a book of account to which Charles Givens referred in quoting figures to him.

The conversations overheard by your deponent indicate that there are other borrowers also paying usurious rates of interest to the said Charles Givens. This allegation is based upon the fact that both Eunice Johnson, also known as Eunice Givens, in her telephone conversation, as well as Charles Givens in his personal conversation in the apartment stated that other borrowers paid different rates of interest.

As a result of the foregoing, your deponent believes that the apartment on the ground floor left in premises 142 Madison Street, in the Borough of Brooklyn, County of Kings, City and State of New York, contains books and records maintained by the aforementioned Charles Givens and Eunice Johnson, also known as Eunice Givens, in the operation of this illegal money lending operation in violation of Sections 340 and 357 of the Banking Law of the State of New York.

WHEREFORE, I respectfully pray that the annexed search warrant, for which no previous application has been made, be issued in accordance with the said statute.

MICHAEL J. LIZZIO

Sworn to before me this
24th day of October, 1963.